TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 167.

WILLIAM A. PLATT, AS RECEIVER OF THE COMMERCIAL NATIONAL BANK OF DENVER, COLORADO, PLAINTIFF IN ERROR,

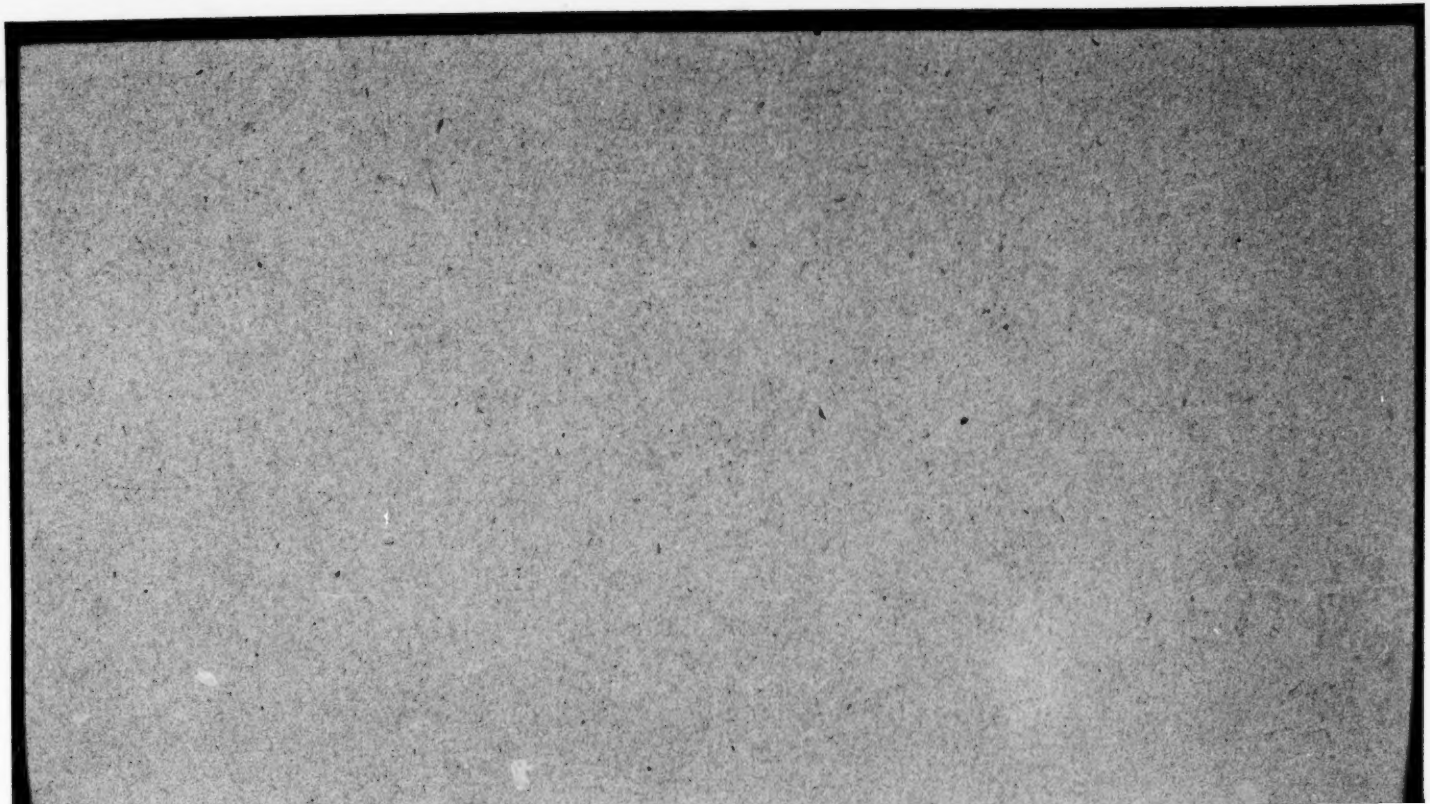
vs.

OSEE W. WILMOT.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED DECEMBER 13, 1902.

(18,747.)



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a United States Circuit Court of Appeals for the Second Circuit.

WILLIAM A. PLATT, as Receiver of the Commercial National Bank of Denver, Colorado, Plaintiff in Error (Plaintiff Below),
vs.
OSEE W. WILMOT, Defendant in Error (Defendant Below).

Transcript of Record.

Error to the circuit court of the United States for the northern district of New York.

[Stamped:] United States circuit court of appeals, second circuit. Filed Oct. 8, 1902. William Parkin, clerk.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the northern district of New York, Greeting:

Because in the record of proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between William A. Platt, as receiver of the Commercial National Bank of Denver, Colorado, and Osee W. Wilmot, a manifest error hath happened, to the great damage of the said William A. Platt, as receiver of the Commercial National Bank of Denver, Colorado, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the second circuit, together with this writ, so that you may have the same at the city of New York on the 24th day of September, 1902, in the said United States circuit court of appeals, that the record and proceedings aforesaid being inspected, the said United States circuit court of appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

2 Witness the Honorable Melville W. Fuller, Chief Justice of the United States at the city of Utica, in the northern district of New York, this 27th day of August, A. D. 1902.

[SEAL.] W. S. DOOLITTLE,
Clerk of the Circuit Court of the United States for the Northern District of New York,
By C. W. HIGGINSON, *Deputy.*

Allowed by
ALFRED C. COXE, *U. S. J.*

(Endorsed:) At law 3311.—U. S. circuit court.—N. D. of N. Y.—Wm. A. Platt, rec'r, &c., *v.* Osee W. Wilmot.—Writ of error.—U. S. circuit court, N. D. of N. Y.—Filed Aug. 27, 1902.—W. S. Doolittle, clerk.

3 *Præcipe for Summons.*

Circuit Court of the United States for the Northern District of New York.

W. A. PLATT, as Receiver of the Commercial National Bank of Denver, Colorado, Plaintiff,
vs.
OSEE W. WILMOT, Defendant.

Hon. W. S. Doolittle, clerk circuit court U. S., northern district of N. Y.:

You will please issue a summons to the defendant, Osee W. Wilmot, in the above-entitled action.

POWELL & CADY,
Attorneys for Plaintiff.

Office and post office address, No. 206 Broadway, New York city, N. Y.

(Endorsed:) Præcipe for summons.—Filed Sep. 17, 1898.—W. S. Doolittle, clerk.

4 *Complaint.*

Circuit Court of the United States for the Northern District of New York.

WILLIAM A. PLATT, as Receiver of the Commercial National Bank of Denver, Colorado, Plaintiff,
vs.
OSEE W. WILMOT, Defendant.
} Complaint.

The plaintiff complains, and for cause of action alleges, upon information and belief:

I. That during all the times complained of herein, the Commercial National Bank of Denver, Colorado, was a corporation organized and existing under the laws of the United States as a national bank, with its residence and *situs* at the city of Denver, and a citizen of the State of Colorado.

That on October 24, 1893, one Frank Adams was, by the action and order of the Comptroller of the Currency of the United States, appointed receiver of said Commercial National Bank of Denver,

Colorado, under and by virtue of the national banking laws of the United States.

That afterwards and on March 15, 1898, said Frank Adams resigned his office and position as such receiver, and thereupon his resignation was accepted, and the Comptroller of the Currency of the United States, under and by virtue of the powers vested in
5 him by the national banking laws of the United States, appointed William A. Platt, this plaintiff, as receiver of the said Commercial national bank, with power and authority to collect all assets of said bank and close up all of its affairs.

That thereupon said William A. Platt, this plaintiff, qualified as such receiver, and is now the acting receiver of the said Commercial National Bank of Denver, Colorado, under and by virtue of his said appointment by the Comptroller of the Currency. That this plaintiff has been authorized and directed to prosecute this action for collection of the judgment, claim and demand of the said Commercial National Bank against The Western Farm Mortgage Trust Company of Lawrence, Kansas, as such receiver, and for the purpose of winding up the affairs of said bank.

II. That the defendant Osee W. Wilmot is a resident and citizen of the district of this court and the State of New York.

III. That the Western Farm Mortgage Trust Company of Lawrence, Kansas, was at all the times hereinafter mentioned, a corporation organized as a business corporation, and existing under and by virtue of the laws of the State of Kansas, with a capital stock of $1,500,000, and had its residence and principal place of business at the city of Lawrence, in the county of Douglas, State of Kansas, and it was not a railroad, religious or charitable organization.

IV. That heretofore and on the 3d day of June, 1893, the said Commercial National Bank, in an action then pending in the district court of Douglas county, in the State of Kansas, wherein said Commercial National Bank of Denver, Colorado, was plaintiff and The Western Farm Mortgage Trust Company of Lawrence, Kansas, was defendant, by the consideration of said court recovered a judgment against said Western Farm Mortgage Trust Company, of
6 Lawrence, Kansas, for the sum of $4,930.72 (in an action for debt) with interest on said judgment from the date thereof at the rate of ten per centum per annum.

V. That the said Western Farm Mortgage Trust Company of Lawrence, Kansas, was duly and personally served with summons in said action, in the manner prescribed by the laws of the State of Kansas, and said Western Farm Mortgage Trust Company of Lawrence, Kansas, duly entered its appearance in said action, and that said district court had full jurisdiction of the person of the said Western Farm Mortgage Trust Company of Lawrence, Kansas, in said action and of the subject matter of the action.

VI. That said judgment has not been appealed from, has not been paid, and still remains in full force and effect and there is now due the plaintiff upon said judgment the sum of $4,930.72 with interest

thereon from said June 3, 1893, at the rate of ten per centum per annum.

VII. That afterwards and on August 29, 1894, the said Frank Adams as receiver, caused to be issued and there was issued by the clerk of the district court of Douglas county, Kansas, an execution on the aforesaid judgment directed to the sheriff of said Douglas county, State of Kansas (the same being the county of the residence of the said Western Farm Mortgage Trust Company of Lawrence, Kansas), directing him (the said sheriff) to levy upon and sell the goods, chattels, personal and real property, lands and tenements of the said Western Farm Mortgage Trust Company of Lawrence, Kansas, for the payment of said judgment and costs; that The Commercial National Bank of Denver, Colorado, was the plaintiff in said execution, and the said Western Farm Mortgage Trust Company was the defendant in said execution. That said execution
7 was thereupon and on the 29th day of August, 1894, delivered to the sheriff of said Douglas county, in the State of Kansas, for execution and return, as therein commanded, and that afterwards, to wit, on the 7th day of September, 1894, said sheriff returned said execution to the clerk of the district court of Douglas county, in the State of Kansas, *nulla bona* and wholly unsatisfied, there being no property found whereon to levy said execution.

VIII. That at the time of the *insurance* of said execution the said Western Farm Mortgage Trust Company of Lawrence, Kansas, was wholly insolvent and had no property or assets whatever subject to execution, nor has it at any time since the issuance of said execution, had any property or assets whatever subject to execution out of which the amount of said judgment or any part thereof could be paid or collected.

IX. That at the time of the pendency of said action and the rendition of the judgment thereon, and the return of the execution thereon, the defendant, Osee W. Wilmot, was and still is a stockholder and shareholder and owner and holder of twenty (20) shares of the capital stock of the Western Farm Mortgage Trust Company of Lawrence, Kansas, of the par value of one hundred dollars each, total par value two thousand dollars, and that by reason of the facts hereinbefore stated, and the provisions of the constitution and the laws of the State of Kansas and of the United States, said Osee W. Wilmot became and is liable to this plaintiff in an amount equal to the capital stock of the said Western Farm Mortgage Trust Company of Lawrence, Kansas, owned by the said Osee W. Wilmot, to wit, the sum of two thousand dollars with interest thereon from the 17th day of September, 1898.

Wherefore the plaintiff demands judgment against the de-
8 fendant for the sum of two thousand dollars ($2,000) with interest thereon from the 17th day of September, 1898, together with the costs of this action.

POWELL & CADY,
Attorneys for Plaintiff.

Office and post office address, 206 Broadway, New York city.

STATE OF NEW YORK, }
County of New York, } ss:

Omar Powell, being duly sworn, deposes and says:

That he is one of the attorneys for the plaintiff in this action; that he has read the foregoing complaint and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

That the sources of affiant's information and belief as to those matters therein stated to be alleged upon information and belief are statements of plaintiff's agent made to affiant, and letters, memoranda and data received from him, and the certificate of the clerk of the district court of Douglas county, Kansas, and certified copy of the charter of the Western Farm Mortgage Trust Company of Lawrence, Kansas, all of which papers are now in affiant's possession.

That the reason this verification is made by Omar Powell, plaintiff's attorney, is that the plaintiff is a foreign corporation and is not, neither are any of its officers, within the county where plaintiff's attorneys reside and have their office.

OMAR POWELL.

Sworn to before me this 13th day of October, 1898.

G. H. FALKENBURG,
Notary Public, Kings County.

Cert. filed in New York Co.

(Endorsed:) Complaint.—Filed Apr. 1, 1902.—W. S. Doolittle, clerk.

9 *Summons.*

United States Circuit Court for the Northern District of New York.

W. A. PLATT, as Receiver of the Commercial National Bank of Denver, Colorado, Plaintiff,
against
OSEE W. WILMOT, Defendant. } No. 3311.

To the above named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States of America, at the city of Utica, in said northern dis-

trict of New York, this seventeenth day of September, in the year of our Lord one thousand eight hundred and ninety-eight.

[L. S.] W. S. DOOLITTLE, *Clerk.*

POWELL & CADY,
Plaintiff's Attorneys.

Office and post office address, 206 Broadway, New York city, New York.

10 UNITED STATES OF AMERICA, } ss:
Northern District of New York, }

I hereby certify that on the 1st day of October 1898, at Watertown, I personally served the within summons on the within named defendant, Osee W. Wilmot, by showing the same and delivering to and leaving with him true copy thereof.

W. R. COMPTON,
U. S. Marshal,
By W. S. COLE, *Deputy.*

Service	2 00
Travel	4 20
	6 20

(Endorsed:) Summons.—Filed Oct. 7, 1898.—W. S. Doolittle, clerk.

Notice of Retainer.

United States Circuit Court for the Northern District of New York.

W. A. PLATT, as Receiver of the Commercial National Bank of Denver, Colorado,
vs.
OSEE W. WILMOT. } No. 3311.

GENTLEMEN: Please take notice that we have been retained and hereby appear for the defendant in the above entitled action;
11 and demand a copy of the plaintiff's complaint, which may be served upon us at our office, No. 16 Washington street, Watertown, N. Y.

Dated October 8, 1898.

Yours, &c., ROGERS & ATWELL,
Defendant's Attorneys.

Office and P. O. address, 16 Washington street, Watertown, N. Y.

To Messrs. Powell & Cady, plaintiff's attorneys, and clerk, U. S. circuit court.

(Endorsed:) Notice of retainer.—Filed Oct. 10, 1898.—W. S. Doolittle, clerk.

Answer.

Circuit Court of the United States for the Northern District of New York.

WILLIAM A. PLATT, as Receiver of the Commercial National Bank of Denver, Colorado,
against
OSEE W. WILMOT.
No. 3311.

I.

The defendant answering the complaint admits that he is a resident and citizen of the district of this court, and the State of New York.

12 That on and prior to the month of October, 1891, there was a corporation by the name of the "Western Farm Mortgage Trust Company of Lawrence, Kansas," organized as a business corporation and existing under and by virtue of the laws of the State of Kansas, with a capital stock of $1,500,000; and had its residence and principal place of business at the city of Lawrence, county of Douglas, State of Kansas, and was not a railroad, religious or charitable organization.

That on and prior to the last mentioned date, the defendant was a stockholder and shareholder and owner and holder of twenty shares of the capital stock of the said Western Farm Mortgage Trust Company, of Lawrence, Kansas, of the par value of $100 each and of the total par value of $2,000; but he denies that he now is, or at any time since the commencement of this action was, or at any time since said October, 1891, has been, a stockholder or shareholder, or owner or holder, of twenty shares, or any shares, of the capital stock of the said Western Farm Mortgage Company of Lawrence, Kansas.

And the defendant denies any knowledge or information sufficient to form a belief as to each and every other allegation in said complaint contained.

II.

And the said defendant for a second and further answer and defense herein, on information and belief alleges:

That the pretended cause of action set out in the complaint did not accrue to the said Commercial National Bank of Denver, Colorado, nor to Frank Adams, as receiver of the Commercial National Bank of Denver, Colorado, nor to the plaintiff as the successor in office of said Frank Adams, as receiver of the Commercial National Bank of Denver, Colorado, at any time within the six years next preceding the commencement of this action.

13 III.

That said defendant for a third and further answer and defense herein, on information and belief alleges:

That the pretended cause of action set forth in the complaint is one to force a liability created by the constitution or statute law of the State of Kansas; that said Western Farm Mortgage Trust Company of Lawrence, Kansas, was, at the time of its organization and at the time of the issuing of the stock therein mentioned, a moneyed corporation, and that the pretended cause of action set forth in the complaint is one to enforce a liability created by the constitution and statute law of the State of Kansas; and that the alleged right of action for the liability claimed to have been so created under said constitution and statute, or either, did not accrue to the plaintiff, to Frank Adams, his predecessor in office, nor to the Commercial National Bank of Denver, Colorado, at any time within the three years next preceding the commencement of this action.

IV.

Said defendant for a fourth and further answer and defense herein, on information and belief alleges:

That the said Commercial National Bank of Denver, Colorado, did not bring an action for the collection of its alleged debt against the said Western Farm Mortgage Trust Company of Lawrence, Kansas, within two years after the debt became due, and that the defendant ceased to be a stockholder in the said Western Farm Mortgage Trust Company of Lawrence, Kansas, more than two years prior to the commencement of this action.

V.

The said defendant for a fifth and further answer and defense herein, on information and belief, alleges:

14 That at the time of the commencement of this action A. G. Brower, of Utica, N. Y.; M. P. Mason, of Carthage, N. Y.; Martin V. B. Bull, of Albany, N. Y., and divers others persons to this defendant unknown (but all well known to plaintiff), all being residents and citizens of the northern district of the State of New York, were, and still are owners and holders of divers shares of the capital stock of the said Western Farm Mortgage Company of Lawrence, Kansas; and that an ascertainment and adjustment of the rights and liabilities of this defendant to and with said plaintiff and the creditor whom he claims to represent, cannot be had without the presence of said stockholders as parties to this action; and that the said persons so named and the said unknown stockholders are and each of them is a necessary party defendant herein.

Wherefore, defendant demands judgment dismissing plaintiff's complaint, with costs.

ROGERS & ATWELL,
Defendant's Attorneys.

Office and P. O. address, 16 Washington street, Watertown, N. Y.

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Supreme Court of United States.

OCTOBER TERM, 1903.

WILLIAM A. PLATT, as Receiver of the Commercial National Bank of Denver, Colorado,
Plaintiff in Error,
vs.
OSEE W. WILMOT,
Defendant in Error.
No. 167.

In Error to the United States Circuit Court of Appeals for the Second Circuit.

STATEMENT.

This action was begun in the Northern District of the State of New York on the 15th day of September, 1897, for the purpose of recovering from the defendant the sum of $2,000, on account of what is commonly called his double liability as a stockholder in the Western Farm Mortgage Trust Company of Lawrence, Kansas, a corporation organized under the laws of the State of Kansas.

On the trial in the Circuit Court the judgment was for the defendant, the Court holding that plaintiff's cause of action was barred by the provisions of Section 394 of the Code of Civil Procedure of the State of New York. There-

upon the case was taken by plaintiff, on writ of error, to the Circuit Court of Appeals for the Second Circuit, where the judgment of the Circuit Court was affirmed, the Circuit Court of Appeals also holding that plaintiff's action was barred by the provisions of said Section 394.

The essential facts are as follows:

The said Western Farm Mortgage Trust Company was organized under the laws of the State of Kansas, *as a business corporation*, on the 28th day of November, 1887, with a capital stock of $1,500,000, divided into shares of the par value of $100.00 each and with its chief office and place of business at the City of Lawrence, Douglass county, Kansas. The Commercial National Bank of Denver, Colorado, on the 3rd day of June, 1893, recovered in the District Court of Douglass county, Kansas, a judgment against said Western Farm Mortgage Trust Company, in the sum of $4.930.72. On the 29th day of August, 1894, there was issued on said judgment an execution directed to the sheriff of said Douglass county, Kansas, commanding him to levy upon and sell the property of said Trust Company for the payment of said judgment, which said execution was, on said 29th day of August, 1894, delivered to said sheriff, and on the 7th day of September, 1894, said sheriff returned the same *nulla bona*, the said Trust Company being wholly insolvent and having no property whereon said execution could be levied.

Subsequent to the date of the rendition of said judgment against said Trust Company, and prior to the institution of this suit, plaintiff was appointed receiver of said Commercial National Bank by the comptroller of the currency, and by him authorized and directed to institute and prosecute this action.

Long prior to the rendition of said judgment of said

bank against said Trust Company, the defendant in error became the owner and record holder of capital stock of said Trust Company to the amount of $2,000.

Section 2, of Article XII, of the Constitution of Kansas, is as follows:

"Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder; and such other means as shall be provided by law; but such individual liabilities shall not apply to railroad corporations, nor corporations for religious or charitable purposes."

Section 32, Chapter 23, General Statutes of Kansas, is as follows:

"If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder except upon an order of the Court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and, upon such motion, such Court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

The only question that will be presented for the consideration of this Court, is whether or not plaintiff's action is barred by statute of limitation; and this question depends upon whether Section 382, or Section 394, of the Civil Code of New York, is applicable.

Section 382, which plaintiff in error insists is applicable, is as follows:

Within six years:

"1. An action upon a contract obligation or liability, express or implied; except a judgment or sealed instrument.

2. An action to recover upon a liability created by statute; except a penalty or forfeiture.

3. An action to recover damages for an injury to property, or a personal injury; except in a case where a different period is expressly prescribed in this chapter.

4. An action to recover a chattel.

5. An action to procure a judgment other than for a sum of money, on the ground of fraud, in a case which, on the thirty-first day of December, 1846, was cognizable by the court of chancery. The cause of action, in such a case, is not deemed to have accrued, until the discovery by the plaintiff, or the person under whom he claims, of the facts constituting the fraud.

6. An action to establish a will. Where the will has been lost, concealed, or destroyed, the cause of action is not deemed to have accrued, until the discovery, by the plaintiff, or the person under whom he claims, of the facts upon which its validity depends.

7. An action upon a judgment or decree, rendered in a Court not of record, except where a transcript shall be filed, pursuant to Section 3017, of this act, and, also, except a decree heretofore rendered in a surrogate's court of the state. The cause of action in such a case is deemed to have accrued when final judgment was rendered."

Section 394, which defendant in error contends is applicable, is as follows:

"This chapter does not affect an action against a director or stockholder of a moneyed corporation, or banking association, to recover a penalty or forfeiture imposed, or to enforce a liability created by the *common law* or *by statute;* but such an action must be brought within three years after the cause of action has accrued."

Said section 394 was originally enacted to cover certain liabilities which the Statute of that state imposed upon stockholders and directors of corporations, on account of certain acts of malfeasance and misfeasance; and the

history of said section clearly shows that it was never intended to apply to any other than New York corporations.

The Western Farm Mortgage Trust Company was not a railroad, religious or charitable corporation, nor was it a banking or insurance corporation, but was organized under the laws of Kansas, *as a business corporation.*

In its Articles of Incorporation the purposes for which it was organized are set forth as follows:

"Article II. The purposes for which it is formed are to receive deposits of money, bonds and securities; *to loan money on real estate and personal security; to negotiate loans on real estate and other securities;* to purchase and sell bonds and notes secured by mortgages and deeds of trust on real estate; to purchase and sell municipal bonds and the bonds, assets and franchises and securities of other corporations; to issue and sell its debentures and secure the same by pledge of notes, bonds and other securities, real or personal; to guarantee the payment of principal and interest of loans by it negotiated or made and sold; to act as financial agent of any state, municipality, corporation, association, company or person; to purchase, hold, sell and convey such real estate and personal property as it may require for its use; to purchase, hold, sell and convey such real estate and personal property as may be necessary for the security or collection of claims due or owing it; to accept and execute any trust committed to it by any municipality, corporation, association, company, person or other authority."

This case was decided by the Circuit Court, Judge Cox presiding, on the authority of the case of *Hobbs vs. Bank,* C. C. A. Rep. That case was decided by the Circuit Court, the same Judge presiding, in favor of the plaintiff, but on appeal the Circuit Court of Appeals of the Second Circuit reversed the judgment, two of the judges holding that the action was barred by the three-year limitation, and the other holding that the six year limitation applied.

SPECIFICATION OF ERRORS.

Plaintiff in error says that the Circuit Court of the Northern District of New York committed error in holding that plaintiff's action was barred by the provisions of Section 394 of the Civil Code of the State of New York; and also committed error in rendering judgment in favor of defendant.

And he also says that the Circuit Court of Appeals of the Second Circuit committed error in holding that plaintiff's action was barred by the provisions of said Section 394; and also committed error in affirming the judgment of the said Circuit Court.

BRIEF.

I.

An examination of the origin and history, and of the phraseology of the enactment will clearly demonstrate that the provisions of Section 394 of the New York Code apply only to actions against directors and stockholders of corporations and associations organized under the laws of that state, and hence are not applicable to this action.

Section 394 of the New York Code is an exception to the General Statutes of Limitations—taking out, as it were, some of the cases governed thereby. Under the familiar rules of construction the exception is to be construed as applicable only to those cases clearly and plainly covered by it. By the express terms of this section it is limited in its operation to actions against directors and stockholders in "*moneyed corporations*" and "*banking associations.*"

These terms are both peculiar to the legislation of the State of New York. They are unknown to the common law. They are not used by the text writers nor found in the statutes of other states, but they have been, for many years, in constant use in the State of New York, *and always with reference to New York corporations.*

The second title of Chapter 18, of the Revised Statutes of New York, enacted in 1827, is entitled "*of moneyed corporations,*" and that was the legislative origin of this term.

Article I, of this title, prescribes rules for the regulation of "*moneyed corporations,*" and the management of their affairs, and imposes penalties and *like* liabilities on the

directors and stockholders for the violation of these rules. It prohibits the making of dividends, except from the surplus profits, the withdrawal of any part of the capital without the consent of the legislature, the taking of notes in payment of any part of the capital stock, the making of excessive loans, loans to directors, etc. It provides for the manner of ascertaining the surplus profits from which dividends may be made, and for charging off losses. It prescribes when and how loans shall be called in, and provides for the disposition of hypothecated stock. It imposes penalties on the directors for violations of these regulations, and provides that, in certain cases, when judgment against the directors for such penalties cannot be collected, the stockholders shall be liable therefor.

Article II provides for the election of directors of "*moneyed corporations.*" It directs the manner of conducting such elections, and it imposes penalties on the director for failure to comply with these requirements.

Article III contains definitions of certain terms used in this title, among them the term "*moneyed corporations,*" which is defined to mean "every corporation having banking powers, or power to loan money on pledges or deposits, or authorized by law to make insurances."

From the very nature of these provisions, they must be held to apply *only* to New York corporations. They are absolutely inconsistent with any other idea. The legislature of New York could not have thus regulated foreign corporations, and it would not have attempted to do so.

The same legislature which enacted these provisions of the corporation law, also enacted a law concerning *the limitations of actions.*

Article IV., Chapter 4, Part 3, of the Revised Statutes, in which this same term is used.

Section 44, of said article, reads as follows:

"None of the provisions of this chapter shall apply to suit against directors or stockholders of any moneyed corporations, to recover any penalty or forfeiture imposed, or to enforce any liability created by the second title of the eighteenth chapter of the first part of the Revised Statutes; but all such suits shall be brought within six years after the discovery, by the aggrieved party, of the facts upon which such penalty or forfeiture attached, or by which such liability was created."

This was the origin of said section 394 of the present limitation law of New York. *The contemporaneous origin and use of the term "moneyed corporations" in these two enactments, the corporation law and the limitation law, shows that it was used with the same meaning in both; and must therefore be held to apply, as used in the limitation law, to New York corporations only.*

Mr. Sutherland, in his work on Statutory Construction, section 255, states the rule thus:

"A word repeatedly used in a statute will bear the same meaning throughout, unless a different intention appear."

So, if the *same* term, especially a new term, be used in different enactments by the *same* legislature, it will be presumed to have been used with the *same* meaning in both, unless a different intention clearly appear.

Moreover, the meaning of this term, as used in said section 44, is removed from the sphere of controversy, because by its express terms, said section is made applicable to suits to "*recover penalties imposed and enforce liabilities created by the second title of chapter eighteen of the first part of the Revised Statutes.*" It therefore follows necessarily that the term "*moneyed corporations,*" as used in said section, refers *only* to corporations organized under the laws of New York.

Said Section 44, as enacted in the Revised Statutes, remained unaltered until 1848, when it was amended by the substitution of the words *"the chapter of the Revised Statutes, entitled 'of corporations,'"* in place of the words, *"the second title of the eighteenth chapter of the first part of the Revised Statutes,"* and as thus amended, was enacted as Section 89 of Chapter 4, of the Laws of 1848, and reads as follows:

"None of the provisions of this chapter shall apply to suits against the directors or stockholders of a moneyed corporation, to recover any penalty or forfeiture imposed, or to enforce any liability created by the chapter of the Revised Statutes, entitled 'Of Corporations,' but all such suits shall be brought within six years after discovery by the aggrieved party, of the facts upon which such penalty or forfeiture attached, or by which such liability was created."

This amendment seems to have changed the phraseology without materially affecting the meaning of the section.

Again, in 1849, this section was amended by the substitution of the words, *"this title shall not affect actions,"* in lieu of the words, *"none of the provisions of this chapter shall apply to suits,"* by the insertion of the words, *"or banking association,"* after the words, *"moneyed corporation;"* and by the substitution of the words, *"by law,"* in place of the words, *"by the second title of the chapter of the Revised Statutes, entitled 'Of Corporation;'"* and, as thus amended, was enacted as section 109 of the Code, and reads as follows:

"This title shall not effect actions against directors or stockholders of a moneyed corporation or banking association, to recover a penalty or forfeiture imposed, to enforce a liability created by law; but such actions must be brought within six years after the discovery, by the aggrieved party, of the facts upon which the penalty or forfeiture attached, or the liability was created."

As thus amended in 1849, it remained unaltered until 1877, at which time the words, *"Three years after the cause of action has accrued,"* were substituted for the words, *"Six years after the discovery by the aggrieved party, of the facts upon which such penalty or forfeiture attached, or by which such liability was created."*

From the incipiency of this law in 1827 down to 1877, the policy of the legislation on this subject seems to have remained the same, except the shortening of the period of limitation to three years. The purpose of this was doubtless to encourage the people of the State of New York to invest their money in their home institutions.

However, a consideration of the amendment of 1877 is not important, so far as the question involved in the case at bar is concerned, as it only changed the period of limitation without in any way affecting the class of actions to which the law applied.

As amended by said act of 1877, said section was enacted as section 394 of the Code; and it is now contended that the language "created by law," incorporated into this section by the act of 1849, is broad enough to embrace actions against directors and stockholders of foreign corporations, as well as those of New York; but it must be borne in mind that this language *is controlled and limited* by the terms *"moneyed corporations,"* and *"banking associations,"* both of which refer exclusively to *New York corporations and associations.* Moreover, that such was not the intention of the legislature will clearly appear from a consideration of this amendment in connection with other legislation, prior and contemporaneous, which evidently created the necessity for the change in the law.

In 1838 a law providing for the formation of *"banking*

associations," was enacted (Chapter 260 of the laws of 1838).

This was the legislative origin of the term *"Banking associations."* These associations, in many respects pertaining to their organization and management, differed from ordinary corporations. The courts had decided that they were not subject to the provisions of the *second title of Chapter* 18 *of the first part of the Revised Statutes,* and their shareholders were, therefore, *not* subject to the liabilities imposed by said title (*Robinson vs. Bank,* 21 N. Y., 406); and besides it was expressly provided in said act authorizing the organization of these associations (Section 33, Chapter 260 of the Laws of 1838), that their shareholders should not be liable for the debts of the association, unless expressly so provided, in the Article of Association by them signed. But the legislature of 1849, the *same that made the above recited change in the limitation law,* enacted a statute (Chapter 226 of the Laws of 1849), *making the stockholders in all corporations, or joint stock companies, for banking purposes,* issuing bank notes for circulation as money, *liable for all debts and liabilities* that might be contracted after January 1, 1850. This act also prescribed certain regulations concerning such corporations and associations, and *imposed penalties* on any officer who should fail to comply with these regulations. This placed the officers and shareholders of *"banking associations" on a footing similar to directors and stockholders* in *"moneyed corporations";* and it naturally followed that the legislature should make the *same limitation law applicable to both.*

Again, the *same* legislature enacted another statute (Chapter 308 of the Laws of 1849), providing for the organization of insurance companies. This act *imposes penal-*

ties and liabilities on the directors and stockhholders of such companies, under certain conditions; and it was, therefore, reasonable and proper that the *same limitation law should apply to actions against them also.* This constituted another reason for the change of the phraseology of this section of the limitation law. The language of the section, as it had formerly stood, "*Penalties and forfeitures imposed and liabilities created by the second title of the chapter of the Revised Statutes, entitled 'Of Corporations,'*" would not have embraced actions against directors and stockholders in said insurance companies, nor actions against the officers and shareholders in "banking companies," because the penalties and liabilities were *not imposed* upon the stockholders in either, *by said chapter of the Revised Statutes.*

Therefore, the legislature, for the purpose of making this section of the limitation law embrace the new penalties and liabilities which it had created, changed the phraseology and substituted the words, "*by law,*" in lieu of the words, "*second title of the chapter of the Revised Statutes, entitled 'Of Corporations.'*"

Bostwick vs. Brinkerhoff, 99 N. Y., 185.

By no recognized rule of construction can there be attributed to the legislature an intention to make this section embrace actions against the directors and stockholders of foreign corporations.

"It is in the last degree improbable that the legislature would depart from the general system of the law, without expressing its intention *with irresistible clearness.*"

Endlich on Interpretation of Statutes, Section 113.
United States vs. Fisher, 2nd Cranch., 390.

According to the general system enacted more than twenty years prior to this amendment of 1849, this section,

excepting certain actions from the operation of the general limitation law of the state, had been applicable *only to actions against directors and stockholders in New York corporations;* and doubtless, *if the legislature had intended to effect a change so radical as to make it apply to foreign corporations, it would have done so in language so clear and unequivocal as to admit of no other construction.*

"It is an established rule of construction that general words and phrases, however wide and comprehensive in their literal sense, must be construed as strictly limited to the immediate objects of the act, and as not altering the general principle of the law; that is, they are to be construed as near the use and meaning of the prior law as may be, without violation of their obvious meaning."

Endlich on Interpretation of Statutes, Section 113.

The general term, "*created by law,*" used in said amendment of this section, must be construed as not altering the prior law so as to make it extend to foreign corporations, especially as the reason for the change of the phraseology can be found in the necessity for making the law *embrace new liabilities* that had been created by the *same* legislature which made the change.

"It is indispensable to a correct understanding of a statute, to inquire first what is the subject of it, and what object it is intended to accomplish."

Sutherland on Stat. Const., Section 218.

"The interpreter, in order to understand the subject matter and the scope and object of an enactment, must ascertain what was the mischief or defect for which the law had not provided, that is, he must call up all those historical facts which are necessary for this purpose and which led to the enactment."

Endlich on Interpretation of Statutes, Section 29.

Here the historical facts consist of legislative enactments, and they show that the defect to be remedied was the failure of this section, as it stood prior to this amendment, to cover actions to enforce liabilities which had just been imposed on the officers and stockholders of "banking associations," and insurance companies.

Another familiar rule of construction is that,

"Where words have been adopted by the legislature as having a certain definite meaning prior to a particular statute in which they are used, they must be construed in such statute according to the sense in which they have been theretofore used."

Sutherland on Stat. Const., Section 255.
The Abbottsford, 98 U. S., 440.
County Seat of Linn County, 15 Kansas, 379.

In the amendment of this section in 1849, the legislature retained the term "*moneyed corporations,*" which had been in use for more than twenty years as designating a certain class of corporations created by and organized under the laws of the State of New York; and, in the absence of clearly expressed intention to the contrary, it must be presumed that this term was used in this amendment with reference to this same class of New York corporations, and not with reference to corporation of other states, in the Statutes of which this term was not to be found.

"Every statute must be read in the light of the general laws on the subject in force at the time of its enactment."

U. S. vs. Freight Ass'n., 58 Fed. Rep., 58.

So, every particular expression or term must be considered in the light of its long continued use in prior legislation; and, thus construing the term, "*moneyed corporations,*" the conclusion is irresistible that it was intended to apply only to New York corporations.

Endlich on Interpretation of Statutes, Section 85, says:

"The rule which requires the construction of statutes with reference to their objects and subject matters, obviously also requires the language of the statute to be construed in the sense it bore at the period when the statute was enacted."

In 1849, when this amendment was enacted, the term "*moneyed corporations*" bore a well defined meaning—the designation of a certain class of New York corporations—and it must be confined to that meaning in this amendment.

It requires no argument to show that the term "*banking associations,*" used in this amendment of 1849, referred only to associations organized under the act of April 18th, 1838 (Chapter 260 of the Laws of 1838). In fact, we have a legislative declaration to that effect in section 10 of Chapter 189 of the Laws of 1857. This position will scarcely be controverted.

Probably every state in the Union has enacted a corporation law. Each one has subdivided and classified its corporations according to its own peculiar views, and has adopted such terms to designate these different classifications as its legislature deemed appropriate. The terms thus used become local, and acquire a local signification, and whenever found in the statutory law of a state which has thus adopted and localized them, they must be construed as referring to the corporations of that particular state, unless the language of the law is such as to clearly and unmistakably indicate a contrary intention.

The terms "*moneyed corporations*" and "*banking associations*" having been adopted by the legislature of the State of New York for the purpose of designating a certain class of *its* corporations, and *being peculiar to the legislation of that state*, and there being nothing whatever in the language of section 394, or in its history, or in the circum-

PLATT, &c., *vs.* WILMOT,

Insert at page 17 of brief for plaintiff in error:

Our proposition is made still more sure by the revision of the New York Corporation Law, Chapter 563, Laws of 1890 (White on Corporations, 1902, p. 4).

Sec. 3, Sub. 4. "A moneyed corporation is a corporation formed under or subject to *the* banking or *the* insurance law."

Sec. 3, Sub. 11. "The term corporate law or laws when used in any law forming a part of the revision of the general laws of the State of which this chapter is a part, means the general laws of this State relating to corporations included in such revision."

It must be apparent that "*the* banking" and "*the* insurance laws" refers only to New York corporations. Again, Sub. 11 plainly restricts the same to New York corporations.

Again, the words "created by law," as used in this section, we believe to mean created by the law of New York, or stated another way, a liability created by the statute of another State, even though it be in the nature of a penalty or forfeiture would not be within the section.

If the meaning of the term "moneyed corporations" had been left for the Courts to define there would have been a greater chance for argument.

The Western Farm Mortgage Trust Company was not formed under or subject to the banking or insurance laws of New York. Add to this the fact that § 394 is an exception to an otherwise complete statute of limitations covering all kinds of contracts and liabilities, and that the term "moneyed corporation" is one peculiar to the statutes of New York, and that the Legislature has undertaken to define and limit its meaning and application to certain New York corporations, and the fact that the Statutes of Limitation are not favored by the Courts, and that this section being an exception and should be strictly construed, the conclusion is plain that § 394 does not apply to foreign corporations.

stances attending its enactment to show an intention on the part of the legislature to give these terms a different meaning, we respectfully insist that said section should be limited in its operation to actions against directors and stockholders of New York corporations.

In 1897 said Section 394 was amended by inserting the words "the common law or by Statute," in lieu of the word "law," but that amendment did not in any way alter or enlarge the class of persons to whom said section was applicable. It is still restricted in its application to directors and stockholders of *"moneyed corporations"* and *"banking associations."*

II.

If it be admitted for the sake of argument, that the provisions of Section 394 extend to actions against directors and stockholders of foreign corporations, of the class in said section designated, still said section does not apply to the case at bar, because the Western Farm Mortgage Trust Company is neither a "moneyed corporation" nor a "banking association."

If Kansas had adopted the same classification of its corporations that New York has, and employed the same terms to designate the various classes, then the Western Farm Mortgage Trust Company, if organized under either the law entitled *"of moneyed corporations,"* or that in regard to *"banking associations,"* would come within the provisions of Section 394, but *there is no such classification in Kansas,* and neither of these terms has ever been used to designate any corporation organized under the law of that state. The said company, in which defendant is a stock-

holder, is, therefore, not *eo nomine*, either a moneyed corporation or a banking association.

Now let us see if said company is the kind of corporation described by either of said terms.

It is *not a banking association*, because it is *not authorized, either by the law of its creation or by the terms of its articles of incorporation to carry on a banking business.* In fact, it could not, under the Constitution and Statutes of Kansas, in force at the time of its organization, be a banking association. Section I of Article XIII of the Constitution of that State, declares that, "*no bank shall be established otherwise than under a general banking law,*" thus prohibiting the organization of banking associations, except under a general law for that purpose, and there was no general banking law in Kansas prior to 1891 (Chapter 43, Laws of 1891). The Western Farm Mortgage Trust Company was organized in 1887 under the general corporation laws of Kansas—what is now Chapter 23 of the Revised Statutes of 1889 of that state. This was then the only statute providing for the organization of corporations of any character. It provides that corporations may be organized for certain specified purposes, *but banking is not one of the purposes specified.* It authorizes the formation of "loan and trust companies," but not of banks or banking associations. It also defines the powers of such corporations as may be created under its provisions but *invests no corporation with banking powers.* It will thus be seen that the Western Farm Mortgage Trust Company is not the kind of corporation described by the term "*banking association.*"

Is it embraced in the class described by the term "*moneyed corporations*"?

That term was defined at the time it was first brought

into use in the Revised Statutes of New York, to mean "*a corporation having banking powers, or power to loan money on pledges or deposits, or authorized by law to make insurance.*" An examination of the Articles of Incorporation of said company will show that it does not come within that definition. It was organized as a *loan company* and *not* as a bank. It did not possess banking powers, because no such powers were conferred on it, either by its articles of incorporation or by the provisions of the general corporation law under which it was created. Even if the articles of incorporation had provided that it should possess banking powers, such provision would be inoperative and of no effect, because unauthorized by the law of its creation. It did not have power "*to make loans on pledges or deposits,*" because, in the enumeration of the purposes for which it was organized, set forth in its Articles of Incorporation, *no such powers are mentioned*

Judge SHIPMAN, delivering the opinion of the majority of the Circuit Court of Appeals, in the Hobbs case, said:

"The Western Farm Mortgage Trust Company had power to make loans on pledges or deposits;" but the Court was evidently misled by a mis-quotation, in the brief of counsel for defendant in that case, because in their brief, discussing the powers of said company, they said it was empowered "to loan money on real estate and personal *property,*" while the actual language of the Charter is, "to loan money on real estate and personal *security.*"

By substituting the word "*property*" for the word "*security,*" they gave to this sentence an entirely different meaning. Authority to loan money on "*personal property*" is very different from authority to loan money on "*personal security.*" The words "*to loan on personal property*" might very properly be construed to include loans on "*pledges or deposits*" of personal property, but to loan on "*personal security*" means to loan on the personal under-

taking of one individual to be liable for the debt of another. This is the accepted meaning of the term throughout the entire country. If a banker tells me he will loan me a given sum of money on good personal security, I know that he does not mean on a pledge of jewelry or a deposit of a bond or note—he means the signing or endorsement of my paper by some solvent individual.

That part of the charter which reads, "to *negotiate* loans on real estate and other securities," means that the company had power to act as agent or broker between the borrower and lender of moneys secured by real estate or other securities. The power to *negotiate* loans is quite different from the power to *make* loans on real estate or other securities.

There is no pretense that said company was an insurance company or that it had power to make insurance. It is therefore not the kind of corporation described by the term "*moneyed corporations,*" as defined by the Revised Statutes, at the time of its origin.

This definition continued down to 1892 (Chapter 687, Laws of 1892), when the phraseology was changed, and this term was defined to mean "*a corporation formed under or subject to the banking or insurance law.*" This change of phraseology did not change the meaning of the law. It was not intended to effect a change.

This amendment was in the nature of a revision, and in such case it will be presumed that the legislature did not intend to change the law, unless the language employed is such as to clearly indicate such intention.

In the case of *Dominick vs. Michael*, 4 Sand., 374, the Court said:

"In the construction of a revised statute, a mere change in the language will not be regarded as evidence of an intention to vary the construction, unless the change is such as to render that intention manifest and certain."

To the same effect is the decision in the case of *Douglas vs. Douglas*, 5 Hun., 140, in which the Court used the following language:

"The rule on this subject is well established that 'where a law, antecedent to Revised Statutes, is settled, either by clear expressions of the statute or by adjudications on them, a mere change of phraseology shall not be deemed a change of the law, unless such phraseology evidently purport an intention of the legislature to work a change. *Sedgwick on Statutory Construction*, 428 and 429, and cases there cited)."

In the case of *Crosswell vs. Crane*, 7 Barb., 191, the Court, in discussing this question, said:

"It is well settled that in the revision of statutes, an alteration in the phraseology, or in the omission or addition of words, does not necessarily alter the construction of the act, or imply an intention on the part of the legislature to alter the law. In revision of the laws, reform of the language is not necessarily an alteration of the law. The intention of the legislature to alter the law must be evident, or the language of the new act must be such as palpably to require a different construction, before the courts will hold the law changed upon such revision merely from the fact of a change of the language employed."

See cases there cited.

In *Taylor vs. Delancey*, 2 Cain's Cases in Error, 143, 151, Judge SPENSER, delivering the opinion of the Court, said:

"These acts are of the description of revised laws, and if susceptible of doubt in their interpretation, resort must be had to the law existing antecedently * * * My opinion is founded on this proposition, that when the law antecedently was settled, either by clear expressions of the statutes, or adjudications on them, the mere change of phrase-

ology shall not be deemed or construed a change of the law, unless such phraseology purports an intention in the legislature to work a change."

The law, as it originally stood, defined a moneyed corporation by reference to the powers possessed by banking and insurance corporations. Some of the corporations had been formed under the general laws of New York authorizing their formation, while others had been created by special charter, but were subject to the provisions of the general laws of the state on that subject.

The law, as amended, defined moneyed corporations by reference to the laws under which they were created, or to which they were subject.

The two definitions amount to the same thing. They both point to the same class of corporations. A corporation having banking powers must have been formed under the general banking laws, or created by special charter which conferred on it such powers; and, if created by special charter, it would be subject to the general banking laws. Hence, it would be as well defined by the term "*formed under or subject to the general banking law*," as by the term "*having banking powers*."

The same is true of a corporation authorized to make insurances.

And, inasmuch as the change in the phraseology did not effect a change in the meaning of the law, and as the Western Farm Mortgage Trust Company is not one of that class of corporations described by the former definition of the term, it necessarily follows that it is not embraced in the latter definition. But, even if we construe the language of the latter definition literally, and without any reference to the former, it does not embrace the said company, because *it was not formed under, nor was it subject to a banking*

or an insurance law. It was not formed under, nor is it subject to, a banking law, because at the time of its formation, *there was no banking law in Kansas.* It was not formed under, nor was it subject to, the insurance law, because the subject of insurance is entirely foreign to the purposes set forth in its articles of incorporation. So we see that, whether we apply the *old* or the *new* definition of *"moneyed corporation,"* this company is not the kind of corporation described by that term.

THE INEVITABLE CONCLUSION IS THAT, INASMUCH AS NEITHER THE TERM "MONEYED CORPORATION" NOR THE TERM "BANKING ASSOCIATION" EO NOMINE, EMBRACES THE WESTERN FARM MORTGAGE TRUST COMPANY, AND AS THE NATURE OF SAID COMPANY IS NOT SUCH AS TO BRING IT WITHIN THE CLASS OF CORPORATIONS DESCRIBED BY EITHER OF THOSE TERMS, THIS ACTION IS NOT BARRED BY THE PROVISIONS OF SECTION 394, EVEN THOUGH IT SHOULD RE CONCEDED THAT SAID SECTION APPLIED TO FOREIGN AS WELL AS DOMESTIC CORPORATIONS.

III.

Even if we should concede that the provisions of Section 394 are applicable to foreign corporations, and that the Western Farm Mortgage Trust Company was a moneyed corporation, within the meaning of that term as used in said Section, still plaintiff's action would not be barred by said Section, because defendant's liability, which plaintiff is seeking to enforce, was created by contract, and therefore is governed by Section 382.

2 *Morawitz on Corp.*, Sections 870-873.
Cook on Stockholders (3rd Ed.), 303.
Hawthorn vs. Calef., 2 Wall., 10.
Carroll vs. Green, 92 U. S., 509.

Flash vs. Conn., 109 U. S., 371.
Richmond vs. Irons, 121 U. S., 27.
Bank vs. Hawkins, 174 U. S., 364.
Whitman vs. Bank, 176 U. S., 559.
Howell vs. Manglesdorf, 33 Kansas, 194.
Plumb vs. Bank, 48 Kansas, 484.
Achenbach vs. Coal Co., 2 Kansas App., 357.
Corning vs. McCollough, 1 N. Y., 47.
Wiles vs. Suydam, 64 N. Y., 73.
Conant vs. Van Schaick, 24 Barb., 87.
Norris vs. Wrenchell, 34 Md., 492.
Terry vs. Colman, 13 S. C., 220.

The defendant's liability was created by his contract of ownership of the stock, which was, in effect, an agreement on his part to pay an amount equal to the amount of his stock, toward the payment of the debts of the corporation, if it should become necessary.

As stated by Mr. Morawitz, in his work on corporations, the Statute does not make them liable. It is a mere legislative enactment permitting the persons to incorporate by assuming the liability. When a person becomes a stockholder he agrees to become liable to the creditors in this manner. It is contractual.

In *Howell vs. Manglesdorf*, the Supreme Court of Kansas asserts that "*this liability is in the nature of a guaranty,*" and being in the nature of a guaranty, it must be based on contract.

In *Plumb vs. Bank*, the Supreme Court of Kansas says "*the individual liability stands as a sort of surety for the corporate liability.*" It must therefore be based on contract.

In *Achenbach vs. Coal Co.*, the Kansas Court of Appeals says "the liability of a stockholder in an insolvent

corporation is in the nature of *a liability on contract*, and survives against the legal representatives of a deceased partner."

In *Hawthorn vs. Calef.*, 2 Wall., 10, it was held that the stockholders' liability was contractual, and this Court in discussing the question, says:

"It is quite clear that the personal liability clause in the charter in the present case, pledges the liability or guaranty of the shareholders, to the extent of their stock, to the creditors of the company, and to which pledge or guaranty the shareholders, by subscribing for stocks and becoming members of it, have assented. They thereby virtually agree to become security to the creditors for the payment of the debts of the company, which have been contracted upon the faith of this liability."

Carroll vs. Green, 92 U. S., 509, was an action in equity to enforce the liability of stockholders in a South Carolina bank. The defendant pleaded the Statute barring actions on contracts. The plaintiff contended that it was a liability created by Statute, to which this Court replied:

"The legislature created the corporation and prescribed certain terms to which the stockholders should be pledged. This was an offer on the part of the state. It could be accepted or declined. There was no constraint. By taking the stock the terms were acceded to, the contract became complete and the stockholders were bound accordingly. This same result which followed would have ensued under like circumstances between individuals. The assent thus given and the promise implied are the essence of the liability sought to be enforced in this proceeding. If a remedy at law was necessary, it must be on case."

In *Flash vs. Conn.*, 109 U. S., 371, a Statute of the State of New York, very similar to the Constitution of Kansas, was under consideration, and this Court in discussing the case, says:

"We think the liability imposed by Section 10 is a lia-

bility arising upon contract. The stockholders of the company are by that section made severally and individually liable, within certain limits, to the creditors of the company for its debts and contracts. Every one who becomes a member of the company by subscribing to its stock assumes this liability, which continues until the capital stock is all paid up and a certificate of that fact is made. published and recorded."

In *Richmond vs. Irons*, 121 U. S., 55, this Court, discussing the individual liability of a shareholder in a national bank, uses the following language:

"Under that act the individual liability of a stockholder is an essential element in the contract by which the stockholders became members of the corporation. It is voluntarily entered into by subscribing for and accepting shares of stock. Its obligation becomes a part of every contract, debt and engagement of the bank itself, as much so as if they were made directly by the stockholder instead of by the corporation. There is nothing in the Statute to indicate that the obligation arising under these undertakings and promises should not have the same force and effect, and be as binding in all respects, as any other contracts of the individual stockholder."

In *Bank vs. Hawkins*, 174 U. S., 372, this Court held that the liability of a stockholder in a national bank to respond to an assessment in case of insolvency. *is contractual.*

In case of *Whitman vs. Bank*, 176 U. S., 559, this Court, in discussing the liability of a stockholder in a Kansas corporation, under the laws in controversy in the case at bar. uses this language:

"It would not be doubted that if the stockholders in this corporation had formed a partnership, the obligations of each partner to the others and to creditors would be contractual, and determined by the general common law in respect to partnerships. If Kansas had provided for partnerships, with limited liability, and these parties, complying with the provisions of the Statute, had formed such a partnership, it would also be true that their obligations to

one another and to creditors would be contractual, although only in the Statute was to be found the authority for the creation of such obligations. And it is none the less so when these same stockholders organized a corporation under a law of Kansas, which prescribed the nature of the obligations which each thereby assumed to the other and to the creditors. While the Statute of Kansas permitted the forming of the corporation under certain conditions, the action of these parties was purely voluntary. In other words, they entered into a contract authorized by Statute."

In *Wiles vs. Suydam*, 64 N. Y., 173, it is expressly stated that an action to enforce a liability of the exact nature of that sought to be enforced in the case at bar, is an action on contract, and not one created by Statute.

The defendant in that case was a stockholder and also a trustee of a corporation formed under the general manufacturing act of 1848; and it was sought to hold him liable as a stockholder for a debt of the corporation contracted before the filing of a certificate stating the amount of the capital stock paid in, as required by Section 10 of said act, and liable as a trustee because of a report of the condition of the company not having been made, as required by Section 12. The defendant interposed a demurrer to the complaint, alleging a misjoinder of causes of action. The Court of Appeals held the demurrer well taken, and, in discussing the question (page 176), said that defendant's liability in the one instance was *"created by statute, and in the nature of a penalty imposed for neglect of duty in not filing a report showing the situation of the Company,"* while, in the other, he was *"primarily liable, as a stockholder, for the debts of the corporation, for the amount of his stock,"* and that the cause of action based thereon was *"an action on contract."*

Another case exactly in point, is *Terry vs. Colman*, 13

S. C., 220, which was an action against a stockholder in a bank, the charter of which provided that each stockholder should, upon the failure of the bank, be liable for its debts to an amount equal to twice the amount of his stock. The question involved was upon the Statute of Limitations, and its determination depended on whether the defendant's liability was *created by the Statute* incorporating the bank, or was *a simple contract debt;* and Chief Justice WILLARD, delivering the opinion of the Court, said:

"The debt of a stockholder under this contingent liability must be ranked as a simple contract debt, barred by lapse of four years from the cause of action accrued to the commencement of an action to enforce it. It is a mistake to call this liability of the stockholder a Statute liability. The whole object of the provision of the charter was to regulate the relations that should arise between the corporation and its stockholders. The subscription to the stock was a voluntary act that might be performed or declined. The liability that arose from such subscription, although defined by the charter, arose as the voluntary contract of the parties. This is precisely what the law does in fixing the rate of interest on and as affecting contracts demanding interest, but not fixing the rate, and interest computed under the authority of the Statute might as well be considered as representing a Statute liability as the cause of action in the present case."

Conant vs. Van Schaick, 24 Barb., 87, holds that a law repealing the stockholders' liability was inoperative, as it impaired the obligation of their contract. In the opinion, NELSON, Judge, says:

"Now, it is quite clear that the personal liability clause in the charter in the present case pledges the liability or guaranty of the stockholders to the creditors of the company, and to which pledging or guaranty the stockholders, by subscribing for stock and becoming members of it, have assented. They thereby virtually agree to become security to the creditors for the payment of the debts of the company which have been contracted upon the faith of this liability."

IV.

But even if we admit that the provisions of Section 394 apply to corporations of other states as well as those organized under the laws of New York, that the Western Farm Mortgage Trust Company was a monied corporation, within the meaning of that term, as used in said section, and that plaintiff's action is not based on contract, still said Section does not apply to this action, because the defendant's liability was created neither by the common law nor by any statute.

1. IF DEFENDANT'S LIABILITY WAS NOT CREATED BY HIS CONTRACT IN BECOMING A STOCKHOLDER IN THE CORPORATION, THEN IT WAS CREATED BY THE PROVISIONS OF THE CONSTITUTION OF THE STATE OF KANSAS.

This proposition is conclusively settled by the case of *Whitman vs. Bank*, 176 U. S., 559. Mr. Justice BREWER in delivering the opinion of this Court in that case, says:

"By Section 1 of Article XII of the Constitution of Kansas a certain definite liability is cast upon each stockholder in other than railway, religious and charitable corporations. This liability is for the dues of the corporation and to an amount equal to the stock owned by him. * * * The words, 'shall be secured,' are not merely directory to the legislature to make provision for such liability, but of themselves declare it. To this extent the Constitution is self-executing. * * * A failure of the legislature to create courts or prescribe modes of procedure may, it is true, make ineffective this constitutional provision, but does not destroy the liability; nor is it created by the act of the legislature prescribing the mode of its enforcement. This is the obvious meaning of the constitutional provision. 'The simplest and most obvious interpretation of a constitution, if in itself sensible, is the most likely to be that meant by the people in its adoption'. LAMAR, Justice, in *Lake County vs. Rollins*, 130 U. S., 662, 671."

2. A LIABILITY CREATED BY A CONSTITUTIONAL PROVISION, DOES NOT COME WITHIN THE PROVISIONS OF SAID SECTION 394.

Clark vs. Water Commissioners, 148 N. Y., 1.

In delivering the opinion of the New York Court of Appeals in that case, Judge PECKHAM announces the law as follows:

"We are of the opinion that this proceeding comes under neither subdivision of the section above quoted. It is in no sense a proceeding to recover upon a liability created by Statute. The liability in this case is a liability to make compensation to the owner of lands and property taken by the water commissioners under the provisions of the Statutes above quoted. The liability to pay for property taken is not created by either statute. It is a constitutional liability instead of a mere statutory one. The Constitution prohibits the taking of private property for public use, without due compensation being made therefor. The legislature in giving to the City of Amsterdam, or its agents, in its behalf, the right to take property for public use, and in providing the proper proceeding to be followed in the taking of such property, was creating no statutory liability whatever. It was simply delegating the power to take the land and providing the procedure by which the land might be taken and the constitutional liability to make due compensation might be carried out and enforced. Such a liability, we think, does not come within the second subdivision of Section 382. The Statute does not itself create the liability, although the compensation was to be collected by means of the procedure provided for by it."

In fact, the language of said Section 394 of itself absolutely precludes the idea of it being intended to apply to a liability created by a constitutional provision, because a constitutional provision is neither "*the common law*" nor a "*statute.*"

We respectfully submit that the judgment of the Circuit Court of Appeals and of the Circuit Court should be reversed.

ELIJAH ROBINSON,
OMAR POWELL,
Counsel.

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Supreme Court of the United States.

No. 167.—October Term, 1903.

William A. Platt, as Receiver of the Commercial National Bank of Denver, Colorado, Plaintiff in Error, *vs.* Osee W. Wilmot.	In error to the United States Circuit Court of Appeals for the Second Circuit.

[April 4, 1904.]

Plaintiff in error brings the case here to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, which affirmed the judgment of the Circuit Court for the Northern District of New York, dismissing the plaintiff's complaint upon the merits. The action was commenced in the last named court by the service of a summons on the defendant on October 1, 1898, and was brought by the plaintiff as receiver of the Commercial National Bank of Denver, Colorado, to recover from the defendant the double liability imposed upon him as stockholder in the Western Farm Mortgage Trust Company of Lawrence, Kansas, hereinafter called the trust company.

The defendant answered the complaint and, among other things, set up the defense of the three years' statute of limitations of the State of New York.

The action was tried in the Circuit Court for the Northern District of New York without a jury, and findings of fact were made by the court upon which the conclusion of law was based that the plaintiff's cause of action was barred by section 394 of the Code of Civil Procedure of the State of New York, being the three years' statute of limitations, and that his complaint should therefore be dismissed with costs.

The court found that the bank of which plaintiff was subsequently appointed receiver had commenced an action against the trust company, and on June 3, 1893, had recovered a personal judgment against it for the sum of $4,930.72, with interest thereon from the date of the recovery of the judgment. Execution had been issued upon said judgment on August 29, 1894, and returned unsatisfied on September 7, 1894.

At the time of the rendition of the judgment and the return of the execution unsatisfied, the defendant was the holder of and has continued since that time to hold twenty shares of the capital stock of the trust company.

By the terms of its articles of association the corporate powers of the trust company were, among others, as follows:

"ARTICLE II. The purposes for which it is formed are to receive deposits of money, bonds and securities; to loan money on real estate and personal security; to negotiate loans on real estate and other securities; to purchase and sell bonds and notes secured by mortgages and deeds of trusts on real estate; to purchase and sell municipal bonds and the bonds, assets and franchises and securities of other corporations; to issue and sell its debentures and secure the same by pledge of notes, bonds and other securities, real or personal; to guarantee the payment of principal and interest of loans by it negotiated or made and sold; to act as financial agent of any State, municipality, corporation, association, company or person; to purchase, hold, sell and convey such real estate and personal property as it may require for its use; to purchase, hold, sell and convey such real estate and personal property as may be necessary for the security or collection of claims due or owing it; to accept and execute any trust committed to it by any municipality, corporation, association, company, person or other authority."

Judgment dismissing the complaint having been entered, the plaintiff by virtue of a writ of error obtained a review of the judgment by the Circuit Court of Appeals of the Second Circuit, where it was affirmed, without any opinion, upon the authority, as stated in a memorandum by the court, of the case of *Hobbs* v. *National Bank of Commerce &c.*, (96 Fed. 396.)

The constitution and statutes of Kansas provide for the individual liability of the stockholders in a corporation to an additional amount equal to the stock owned by each stockholder, but the provision does not apply to a railroad corporation, nor to corporations for religious or charitable purposes.

Mr. Justice PECKHAM, after making the above statement of facts, delivered the opinion of the Court.

The only question which the plaintiff in error presents is whether or not this action was barred by the New York three years' statute of limitations, and that depends upon whether section 382 or section 394 of the Code of Civil Procedure of that State is applicable.

Section 382 provides that actions of the following nature shall be barred within six years.

"1. An action upon a contract, obligation or liability, express or implied, except a judgment or sealed instrument.

"2. An action to recover upon a liability created by statute, except a penalty or forfeiture."

Section 394, which the courts below have made applicable to plaintiff's cause of action, reads as follows:

"SEC. 394. This chapter does not affect an action against a director or stockholder of a moneyed corporation, or banking association, to recover a penalty or forfeiture imposed, or to enforce a liability created by the common law or by statute; but such an action must be brought within three years after the cause of action has accrued."

Several objections are made by the plaintiff in error to the application of section 394 to this case. They are (1) that the section does not apply to a director or stockholder of a foreign corporation; (2) that if it be held that it does extend to actions against directors and stockholders of foreign corporations of the class designated in the section, yet it does not apply to this case, because the trust company is neither a moneyed corporation nor a banking association; (3) that the stockholders' liability in this case is one based upon contract, and is not created either by the common law or by statute.

Taking up these objections in their order, we are brought to a consideration of the one which asserts that section 394 does not apply to directors or stockholders of foreign corporations. We think it does.

A history of the legislation upon this subject in the State of New York, which finally resulted in section 394 of the Civil Code, is given in the opinion in *Hobbs* v. *National Bank of Commerce*, (96 Fed. 396,) by Judge Shipman, and it is also referred to by Judge Earl, in *Brinckerhoff* v. *Bostwick*, (99 N. Y. 185.)

The section as originally enacted was section 44, part 3, chap. 4, title 2, of the Revised Statutes, which chapter related to "Actions, and the Times of commencing them." These statutes took effect (as to the greater part) in 1830. The section in question then read as follows:

"None of the provisions of this chapter shall apply to suits against directors or stockholders of any moneyed corporations to recover any penalty or forfeiture imposed or to enforce any liability created by the second title of the first part of the Revised Statutes; but all such suits shall be brought within six years after the discovery, by the aggrieved party, of the facts upon which such penalty or forfeiture attached or by which such liability was created."

Upon the adoption of the Code of Procedure of 1848 the section became section 89 of that code. The second title of the first part of the Revised Statutes, referred to in the section, among other things, imposed liabilities upon the directors and stockholders of the moneyed corporations authorized by that title. If the statute of limitations above quoted had not been amended, it would have been limited to the liabilities mentioned in such title, and would not have included a case like this.

In 1849 section 89 of the Code of Procedure of 1848 became section 109, and read as follows:

"This title shall not affect actions against directors or stockholders of a moneyed corporation or banking association to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within six years after the discovery, by the aggrieved party, of the facts upon which the penalty or forfeiture attached or the liability was created."

The difference in the two sections is plainly seen, and consists in striking out the words as to a liability created by the Revised Statutes, and enlarging the operation of the section to a "liability created by law." The words "liability created by law," were held in *Brinckerhoff* v. *Bostwick*, (99 N. Y. *supra*,) to mean statutory liabilities which, as stated by Judge Earl, (page 192,) "comprehend not only liabilities created by the title and chapter of the Revised Statutes referred to, but also those created by other statutes and the constitution of 1846, (Art. 8, section 7.)"

In 1877 another amendment was made to the section by leaving out the words "six years after the discovery, by the aggrieved party, of the facts upon which the penalty or forfeiture attached, or the liability was created," and substituting therefor the words "three years after the cause of action accrued."

The act was further amended in 1897, and the statute (section 394) reads, after that amendment, in the way it has been quoted above, so that the action must be brought within three years after the cause of action has accrued to enforce a liability created by the common law or by statute.

As to the meaning of this statute, it was held in the Hobbs case (96 Fed. *supra*,) that the legislature meant to enlarge the former limitation so it should no longer be limited to liabilities created by one set of statutes or imposed upon the officers or stockholders of moneyed corporations or banking associations within the State only, but the terms of the statute were held to be so broad as to include every class of liabilities of such stockholders, whether they were stockholders of foreign or domestic corporations. The statute was held to be a totally different one from that which was originally passed, and the language evinced an intention that it should not be so limited as to apply only in favor of a New York stockholder in a domestic corporation but that on the contrary the statute should also apply to a shareholder in a foreign corporation.

In our view this interpretation by the Circuit Court of Appeals is the correct one. We are of opinion that the amendments were not intended to continue the application of the limitation to those corporations only which were domestic and were of the kind mentioned in the Revised Statutes, because as amended the statute used language which was inconsistent with that idea. The original reference to the liabilities of directors and stockholders under the second title of the Revised Statutes was stricken out and in place thereof language was used which clearly indi-

cated a purpose to extend the statute to all liabilities of directors or stockholders in any corporation, foreign or domestic, which liabilities were created by common law or by statute, provided the corporation was a moneyed corporation or banking association. We can see no reason why the director or stockholder of a domestic corporation should cease to be liable in three years from the time the cause of action accrued, while if he were a director or stockholder of a foreign corporation his liability should still last for six years, upon a suit commenced in New York.

It is not the case of a State legislature assuming to regulate foreign corporations, and no such attempt has been made. The substance of the legislation is that when suits are brought in the State of New York to enforce therein the liabilities of directors or stockholders, the statute of limitation enacted by the legislature of that State in regard to directors or stockholders of domestic corporations shall also apply to directors or stockholders of foreign corporations. This is what the legislature has done and this is what it had the right to do.

The Federal courts, sitting in the State, will, in cases brought therein, enforce the State statute of limitations in actions of this nature.

This view of the statute is not affected by reason of the language of the Revised Corporation Law of New York, chap. 563 of the laws of 1890. That act is, by its terms, confined to corporations under the laws of New York, but sec. 394 of the Code is a different statute, and, as has been seen, refers to any corporation, foreign or domestic, which may be a moneyed corporation or banking association within the meaning of the law of New York.

The next objection is, that even if the statute referred to foreign as well as domestic corporations, yet the trust company is not a moneyed corporation within the meaning of the section in question. What is meant by the term "moneyed corporation," in section 394, is shown by the definition of that term given in 1 Rev. Stat. 598, sec. 51, where it is said: "Section 51. The term 'moneyed corporation,' as used in this title, shall be construed to mean every corporation having banking powers, or having the power to make loans upon pledges or deposits, or authorized by law to make insurances."

Although this definition refers to the meaning of the term "moneyed corporation," as used in that title of the Revised Statutes, we think it is plain that the same term used in section 394 of the code means the same thing as defined in section 51. The legislature used a term which was well known in the legislation of New York and for a long period of years a definite meaning had been given to it in that legislation, and when speaking of limitations of actions in regard to moneyed corporations nothing would be more natural than to assume that the term when thus used should have the same meaning applied to it as had been defined by the legislature

when enacting legislation in regard to moneyed corporations. This legislation does not assume to enact what shall be "moneyed corporations," in other States, but its effect is that when actions are brought in the State of New York and the question arises whether a foreign corporation is or is not a moneyed corporation, that question will be solved in such a case as this for the purpose of construing the statute of limitations of the State, by reference to the meaning given to the term by the legislature or courts of New York, rather than by reference to the legislation of another State under which the corporation may have been formed. The question is not what the corporation is, under the legislation of that other State, but whether what it is doing is of that description provided for and designated by the legislation of the State of New York, and if by that legislation it comes within the description of a "moneyed corporation," it must abide thereby so far as regards the statute of limitations of New York and the proper construction to be given it.

Now by reference to the powers granted to the trust company it will be seen that it had power "to receive deposits of money, bonds and securities; to loan money on real estate and personal security; . . . " &c. The powers granted to the trust company bring it distinctly within the definition of the term "moneyed corporation" as used in section 394 of the Code of New York. It had power to loan money not only on real estate but on personal security, and the statute of New York said any corporation having the power to make loans upon pledges or deposits was a moneyed corporation within the meaning of the act.

Again, referring to the Revised Corporation Act of New York of 1890, a moneyed corporation is therein stated to be one formed under or subject to the banking or the insurance law. If a foreign corporation have powers or some of them, which are given a banking association under the law of New York, that foreign corporation is, under the circumstances of this case, a moneyed corporation or banking association within the meaning of the New York statute of limitations now under discussion. This corporation has at least some of those powers, and we think comes within the definition of a banking association, although it also has other powers.

The third objection is that the liability of the stockholder in this case is not created by the common law or by statute, but is contractual in its nature, and is, therefore, governed by section 382, (the material portion of which has already been set forth,) instead of section 394 of the code.

The case of *Whitman* v. *Oxford National Bank*, (176 U. S. 559,) is cited to show that the double liability of the stockholder under the Kansas constitution and statutes is of a contractual nature, and, therefore, not within section 394, because it is not a liability created by common law or by statute. In the Whitman case it was held that this liability, though statutory in origin, was contractual in its nature; or, in other words, the

stockholder when he subscribed for or purchased his stock entered into a contract authorized by statute. In that case it was also held that the constitutional provision did not stand alone, but that the legislature of Kansas had also acted on the subject matter, and that the constitution and the statutes were to be taken together as making one body of law, and that, therefore, it would serve no good purpose to inquire what rights or remedies a creditor of a corporation might have or what liabilities would rest upon a stockholder if either constitution or statutes stood alone and unaided by the other.

We think, within the meaning of section 394, this liability was created by statute, as it was by virtue of the statutes that the contractual liability arose. The language of the section plainly includes this case. It is a liability created by the statute, because the statute is the foundation for the implied contract arising from the purchase of or subscription for the stock, the contract being that the holder of the stock shall be liable in accordance with the terms of the statute.

Also, while the liability is contractual in its nature, it arises out of the constitution or the statute, or from a combination of both, by virtue of the application of general principles of law to the facts in the case. Neither the constitution nor the statute says that the liability is contractual, but, as the constitution and statute existed, the liability arising therefrom, as against the stockholder, is because of the principle of law which works out a contractual liability upon these facts, and it may be fitly described as the common law.

We think the judgment of the Circuit Court of Appeals is right, and it is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.